OPEN COUNTRY DAIRY LTD v. ABLE FOOD SDN BHD

COURT OF APPEAL, PUTRAJAYA
VAZEER ALAM MYDIN MEERA JCA
S NANTHA BALAN JCA
DARRYL GOON SIEW CHYE JCA
[CIVIL APPEAL NO: W-02(IM)(NCC)-1793-11-2020]
24 MAY 2021

CONTRACT: *Terms – Reference – Malaysian company and company incorporated in New Zealand entered into contract for purchase of instant whole milk powder – Products discovered to be defective and of unmerchantable quality – Terms of trade incorporated by reference in sales contract via weblink – Terms of trade provided forum for any dispute in New Zealand and parties submitted to exclusive jurisdiction of courts in New Zealand – Whether parties to contract bound by reference to other incorporated documents – Whether there was consensus between parties on terms of trade*

CIVIL PROCEDURE: *Jurisdiction – Forum – Contract law – Contract entered into between Malaysian company and company incorporated in New Zealand – Parties entered into contract for purchase of instant whole milk powder – Products discovered to be defective and of unmerchantable quality – Allegation of breach of sales contract – Whether proper forum for dispute in New Zealand or Malaysia*

The respondent, a Malaysian company, purchased instant whole milk powder ('milk powder') from the appellant, a company incorporated in New Zealand, *via* sales contracts entered into between the parties between November 2016 and September 2017. It must be noted that an endorsement in the sales contracts, which read as 'Please be advised that OCD has modified its terms of trade please consult the attached terms', could be found in the sales contract for November and December 2016 and January, February and March 2017 but did not appear in the sales contract for September 2017. When the respondent later discovered that a substantial part of the milk powder supplied by the appellant was defective, the former claimed against the latter at the High Court, for breach of contracts *ie*, supplying milk powder of unmerchantable quality ('Suit 653'). The respondent obtained leave of the High Court, pursuant to O. 11 r. 1(1)(F) and r. 4 of the Rules of Court 2012 ('ROC'), and claimed that they had duly served the notice of writ on the appellant in New Zealand. However, the appellant alleged that the notice of writ was not regularly served on the appellant as the Malaysian consular authority in New Zealand had forwarded the same to them by post, instead of by hand, rendering such service inconsistent with s. 388 of the Companies Act 1993 (New Zealand). The appellant further contended that their 'terms of trade' were incorporated by reference in each of the sales contract *via* a weblink where the parties agreed that the forum for any dispute was in New Zealand and the parties submitted to the exclusive jurisdiction of the courts in New Zealand. The appellant then

entered appearance and filed a notice of application, to set aside the respondent's notice of writ, arguing that the courts in Malaysia should not assume jurisdiction over the dispute as parties had submitted to the exclusive jurisdiction of the courts in New Zealand ('encl. 19'). The High Court dismissed encl. 19 on the grounds that the terms of trade were not applicable as there was no consensus on the terms of trade since the 'modified' terms were not attached to the sales contract. Hence, the present appeal which hinged upon the question as to whether the terms of trade were incorporated by reference.

Held (allowing appeal; setting aside order of High Court)
Per S Nantha Balan JCA delivering the judgment of the court:

(1) The terms of trade were found in the weblink and they formed part of the contracts for the purchase of the milk powder. Clause 19.2 of the terms of trade dealt with the express choice of jurisdiction *ie*, the courts of New Zealand. The respondent did not click on or look up the weblink. In fact, there was no evidence that the respondent had accessed the terms of trade *via* the weblink which had been provided, or had attempted to do so. This did not mean that the terms of trade, contained in the weblink, did not apply. The burden was on the respondent to look up the terms of trade *via* the weblink. The failure on the respondent's part to do so was akin to a contracting party not bothering to avail themselves of the terms, and to read and understand the same, with the benefit of legal advice or otherwise. The terms of trade, which were duly incorporated by reference, would apply, regardless of whether the respondent had accessed them *via* the weblink provided. If parties had agreed to be bound by a contract, which also included a reference to another document, regardless of whether parties took the trouble to read them or not, then these documents and their terms would be binding upon the parties. (paras 67-70)

(2) The High Court made much of the fact that the word 'modified' appeared in the sales contract and concluded that there was no consensus because the 'modified' terms of trade were not attached. However, notice of the terms of trade was given at the time when the contract was formed, and it was referred to in a document, which was the sales contract, that one would reasonably expect to contain contractual terms. Express notice was also given to the respondent that the sales contracts were subject to the terms of trade, which was accessible *via* a weblink provided. There was no ambiguity whatsoever as to where the terms of trade were located. This satisfied the requirement that the appellant had taken reasonable steps to bring the terms of trade to the respondent's attention and incorporating it in the sales contracts. The respondent must be held to their bargain and a Malaysian court is obliged to give effect to the exclusive jurisdiction clause, unless the respondent, as the party seeking to avoid the application of the clause, are able to establish

that there are exceptional circumstances to justify the contrary. The appellant had succeeded in demonstrating that the terms of trade were incorporated in the contracts for the purchase of milk powder and that the respondent had filed Suit 653 in disregard of cl. 19.2 of the terms of trade. There was a misdirection on the part of the JC in concluding that there was no consensus *vis-a-vis* the terms of trade. (paras 76, 78, 79 & 82)

Case(s) referred to:

Able Food Sdn Bhd v. Open Country Dairy Ltd [2021] 4 CLJ 614 HC ***(refd)***
AJWA For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd & Another Appeal [2013] 2 CLJ 395 CA ***(refd)***
American Express Bank Ltd v. Mohamas Toufiq Al-Ozeir & Anor [1995] 1 CLJ 273 SC ***(refd)***
Apex Marble Sdn Bhd & Anor v. Leong Tat Yan [2018] 1 LNS 32 HC ***(refd)***
Chapelton v. Barry Urban District Council [1940] 1 KB 532 ***(refd)***
L'Estrange v. F Graucob Ltd [1934] 2 KB 394 ***(refd)***
Olley v. Marlborough Court Hotel [1949] 1 KB 532 ***(refd)***
Parker v. South Eastern Railway Company [1877] 2 CPD 416 ***(refd)***
Petrodar Operating Co Ltd v. Nam Fatt Corporation Bhd & Anor [2014] 1 CLJ 18 FC ***(refd)***
World Triathlon Corporation v. SRS Sports Centre Sdn Bhd [2019] 1 CLJ 381 CA ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 23(1)(a), (c)
Reciprocal Enforcement of Judgments Act 1958, First Schedule
Rules of Court 2012, O. 11 rr. 1(1)(F), (G), 4, O. 12 r. 10(1), (2)
Sale of Goods Act 1957, ss. 15, 16

Companies Act 1993 [NZ], s. 388

For the appellant - Alvin Julian Amalanathan & Long Mohd Noor Adman; M/s Zaid Ibrahim & Co
For the respondent - Richard Kok Chi Wei & Tan Ko Xin; M/s Rhiza & Richard

[Editor's note: For the High Court judgment, please see Able Food Sdn Bhd v. Open Country Dairy Ltd [2021] 4 CLJ 614 (overruled).]

Reported by Najib Tamby

JUDGMENT

S Nantha Balan JCA:

Introduction

[1] On 19 November 2019, Able Food Sdn Bhd (Company No. 1033584-V) ("respondent") filed an action in the High Court of Malaya in Kuala Lumpur, *to wit*, Suit No. WA-22NCC-653-11-2019 ("suit 653") against Open Country Dairy Limited (Company No. 1911063) ("appellant") for alleged breach of contract(s) in, *inter alia*, supplying instant whole milk powder ("IWMP") of unmerchantable quality.

[2] The appellant was incorporated in New Zealand. Until the present dispute erupted, the respondent was a customer of the appellant. In suit 653, the respondent's claim against the appellant was for special damages in the sum of USD 3,493,048.80 plus general damages for loss of profit and loss of market.

[3] The respondent obtained leave of the High Court under O. 11 r. 1(1)(F) and r. 4 Rules of Court 2012 ("ROC") and claimed that they had duly served the notice of writ on the appellant in New Zealand. However, the appellant alleged that the notice of writ was not regularly served on the appellant in New Zealand as the Malaysian consular authority in New Zealand had forwarded the same to them by post, instead of by hand. Thus, it was alleged that service was not in accordance with s. 388 of the Companies Act 1993 (New Zealand).

[4] The appellant also contended that their "terms of trade" were incorporated by reference in each of the sales contracts wherein parties had agreed that the forum for any dispute is in New Zealand and parties had therefore submitted to the exclusive jurisdiction of the courts in New Zealand.

[5] The appellant entered appearance and filed a notice of application dated 8 July 2020 ("encl. 19") pursuant to O. 12 r. 10(1) and/or (2) ROC and/or the inherent jurisdiction of the court, to (1) set aside the notice of writ to be served out of jurisdiction dated 23 December 2019, and (2) that the courts in Malaysia should not assume jurisdiction over this dispute as parties had submitted to the exclusive jurisdiction of the courts in New Zealand.

[6] On 9 November 2020, the learned Judicial Commissioner ("the JC") dismissed encl. 19. See: *Able Food Sdn Bhd v. Open Country Dairy Ltd* [2021] 4 CLJ 614; [2021] 2 AMR 246; [2020] AMEJ 1879; [2021] 9 MLJ 723 HC.

[7] The appellant lodged an appeal to this court against the JC's said decision. In summary, the appellant's complaint was that the JC erred in law and/or in fact in finding that the terms of trade were not incorporated by reference in the sales contracts. It was also alleged that the JC erred in law and/or in fact, in failing to apply the correct principles in deciding whether the court in New Zealand was the forum that had been agreed to by the parties for any dispute arising out of and/or in connection with the sales contracts. The appellant also contended that the JC erred in law and/or fact in finding that Malaysia was the most appropriate forum to hear this dispute.

[8] On 24 May 2021, we allowed the appellant's appeal and set aside the order of the High Court dated 9 November 2020. We also ordered that the action in the High Court be stayed per prayer (5) of encl. 19. This judgment explains our reasons for allowing the appeal.

Background

[9] The respondent purchased IWMP from the appellant *via* contracts that were entered into between November 2016 and September 2017. The details of the contracts (as evidenced by the purchase orders and sales contracts) are as stated in para. (3) of the statement of claim dated 19 November 2019. It may be noted that the statement of claim omitted any reference to the terms of trade. This was presumably because, as far as the respondent was concerned, the terms of trade were not incorporated in the contracts for the supply of IWMP.

[10] According to the respondent, the salient terms of the contracts were all identical and they are as follows:

(i) The descriptions of the IWMP are as follows:

  (a) Physical properties – light cream in colour and free-flowing powder;

  (b) Flavour and odour – sweet-desirable flavour, free from undesirable flavour; and

  (c) Expiration date - two years from the date of production.

(ii) Pursuant to s. 15 of the Sale of Goods Act 1957, it was an implied condition in all the contracts that the IWMP corresponded with its descriptions.

(iii) Pursuant to s. 16 of the Sale of Goods Act 1957, it was an implied condition in all the contracts that the IWMP was reasonably fit for the purposes for which the respondent purchased it.

(iv) It was also an implied condition in all the contracts that the IWMP was of merchantable quality.

[11] However, the respondent discovered that a substantial part of the IWMP which had been supplied by the appellant, was defective. According to the respondent, there were batches of IWMP that were unsuitable and of unmerchantable quality. The respondent's complaints were that the IWMP, despite being described under the contracts as having a shelf life of two years from their production date, suffered from caking, poor solubility, poor wettability, off odour, off flavour, high moisture content, brownish discolouration and separation.

[12] The respondent escalated their complaints to the appellant as and when these defects were discovered, but to no avail. In fact, the complaints were put in writing and the respondent lodged complaints to the appellant on five occasions, namely on 16 May 2017, 15 January 2018, 22 January 2018, 17 July 2018, and 29 April 2019.

[13] The respondent had paid a sum of USD4,652,714-04 for the purchase of IWMP from the appellant. The defective portion of the IWMP was calculated as amounting to USD3,493,048-80. By a letter dated 1 July 2019, the respondent demanded the sum of USD3,493,048-80 from the appellant, but the demand was ignored. On 19 November 2019, the respondent filed suit 653.

[14] In light of our view on the threshold issue of jurisdiction, we did not see the need to discuss or deal with the appellant's allegations of improper service of process in New Zealand.

The Contracts

[15] The main issue takes us to the vexed question whether the parties had entered into the contracts for the sale/purchase of IWMP on the basis of the terms of trade. The appellant's position was that the terms of trade were incorporated by reference in each sales contract. The respondent contended otherwise. The following are particulars of the contracts in question.

No.	Sales Order Number	Date of Sales Contract	Quantity of Instant Whole Milk Powder (IWMP)	Price (USD)
1.	SO0014287	4.11.2016	176.4 Tonnes	591,402.17
2.	0009063-01	9.12.2016	151.2 Tonnes	554,497.27
3.	0009065-01	9.12.2016	151.2 Tonnes	555,253.27
4.	0009389-01	5.1.2017	403.2 Tonnes	1,351,929.6
5.	0010089-01	27.2.2017	151.2 Tonnes	480,277.73
6.	0010315-01A	10.3.2017	252 Tonnes	684,558
7.	0010315-01	10.3.2017	100.8 Tonnes	273,823,20
8.	0011964-01	8.9.2017	51.2 Tonnes	160,972.80

[16] The appellant contended that the contractual relationship between the parties was governed by the following documents:

(i) sales contract;

(ii) terms of trade; and

(iii) purchase order.

[17] The sequence of the contractual documents was as follows. Upon confirmation of price and quantity of IWMP for a particular order, the appellant will forward to the respondent a sales contract for execution by the latter. According to the appellant, the definitive terms of the contract between the parties were to be found in the terms of trade which were incorporated by express reference in each sales contract. When forwarding a duly signed copy of the sales contract back to the appellant, the respondent

would also include a purchase order which provided supplementary details regarding the sales order (eg, delivery and payment details). The appellant contends that the purchase order did not replace or modify the terms of trade.

[18] The appellant's primary complaint in the appeal before us is that the JC had erred in law and in fact in finding that the terms of trade were not incorporated by reference in each sales contract. Significantly, the existence of the endorsement in the sales contract for each of the orders was not disputed and it read as follows:

> http://opencountry.co.nz/termsoftrade
>
> The terms of trade form part of this contract for sale and the parties agree to comply with the terms of trade in performing their obligation under this contract.
>
> Please be advised that OCD has modified its terms of trade please consult the attached terms.

[19] However, the words, "please be advised that OCD has modified its terms of trade please consult the attached terms" did not appear in the sales contract dated 8 September 2017.

The Arguments

[20] The appellant contended that the Malaysian High Court should not assume jurisdiction over the subject-matter of suit 653 because the parties had agreed to submit to the exclusive jurisdiction of the courts in New Zealand for any dispute that may arise between the parties and they had also agreed that the applicable law was the law of New Zealand. These were contained in the "foreign jurisdiction clauses" in the terms of trade which the respondent agreed to when the contracts were entered into, since each sales contract which was signed by the respondent, referred to the terms of trade by way of a "web-link" which the respondent could have accessed at any time.

[21] Thus, the appellant contended that pursuant to cls. 19.1 and 19.2 of the terms of trade respectively, the respondent had expressly agreed that New Zealand law would apply and agreed to submit to the exclusive jurisdiction of the courts in New Zealand. Clauses 19.1 and 19.2 of the terms of trade read as:

> 19. General
>
> 19.1 New Zealand law governs all transactions between the Customer and the Company
>
> 19.2 *If the Customer is domiciled in country that has a reciprocal enforcement of foreign judgment regime with New Zealand, then the Customer submits to the* exclusive jurisdiction of the New Zealand courts. If the Customer is domiciled in a country that does not have reciprocal enforcement of

A foreign judgment regime with New Zealand, then the Customer submits to the exclusive jurisdiction of the Singapore International Arbitration Centre (SIAC). The seat of arbitration will be in Singapore. The arbitration will be conducted in English, in accordance with the Arbitration Rules of SIAC for the time being in force, and the Tribunal will consist of three arbitrators.

B

(emphasis added)

[22] Counsel for the appellant said cl. 19.2 of the terms of trade applied because the respondent was a customer which was domiciled in a country that had a reciprocal enforcement of foreign judgment regime with C New Zealand and they had submitted to the exclusive jurisdiction of the New Zealand courts. In this regard, counsel highlighted that pursuant to the First Schedule of the Reciprocal Enforcement of Judgments Act 1958 (Revised 1972), there is indeed a reciprocal enforcement of judgments regime between Malaysia and New Zealand.

D **[23]** The respondent's case, on the other hand, was that it was never furnished with the terms of trade before or at the time the sales contracts were entered into and that it had no knowledge of the same.

[24] The respondent asserted that the High Court of Malaya had jurisdiction to try any action that fell under any of the 13 limbs under O. 11 E r. 1(1) ROC and that the present action fell under paras. (F) and/or (G) of that rule in that the contracts were made in Malaysia and the breach also occurred here. The respondent submitted that it was trite law that for the purposes of determining encl. 19, the court had to assume that all of the respondent's allegations per the statement of claim were true.

F **[25]** The JC agreed with the respondent and held that the High Court of Malaya was seized of jurisdiction over the instant matter by virtue of s. 23(1)(a) and (c) of the Courts of Judicature Act 1964 as well as paras. (F) and/or (G) under O. 11 r. 1(1) of the ROC.

G **[26]** The JC held that Malaysia was the most appropriate forum to hear the dispute between the parties given that: (a) the contract was made in Malaysia and the breach occurred in Malaysia; (b) all or most of the relevant witnesses and the evidence were within the jurisdiction of the Malaysian court; (c) the respondent had already paid the appellant for the allegedly defective IWMP H (weighing approximately 1,068,375 metric ton) and the court had to assume that the respondent's allegations in its statement of claim were true. The JC opined that the respondent had already paid a huge sum to the appellant and that to make the respondent incur more costs to ship back the IWMP and fly its witnesses to New Zealand for trial there would be "rubbing salt into the wound".

I

[27] The JC said that if the trial took place in Malaysia, the appellant would be put to expense but at least it already had USD3,493,048.80 of the respondent's money; (d) the laws concerning sale of goods and contract in Malaysia and in New Zealand were not materially different; and (e) the matter was assured of a speedy trial in Malaysia. The JC found that there was no consensus between the parties on the foreign law and jurisdiction clause contained in the terms of trade. Consequently, there was no question of any breach of that clause and/or of the court condoning a breach of the agreement between the parties.

[28] For the appellant, it was submitted that by signing the sales contract, the respondent had agreed to be bound by the terms of trade. Counsel for the appellant relied on the Court of Appeal's decision in *AJWA For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd & Another Appeal* [2013] 2 CLJ 395; [2011] MLJU 1537 CA ("*AJWA*'s case") where it was held that:

> [17] The legal position is very clear: that *parties are bound by the terms of the contract which they had executed and this includes reference to another incorporated document where those terms can be found whether they take the trouble of reading them or not. There is imputed knowledge that the terms of the document incorporated are binding as if it was written into the contract itself.*
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> [18] The Indian court in the case of *TN Rao v. Balabhadra* AIR 1954 Mad 71, supports the above proposition. Venkatarama Aiyar J in that case ruled as follows:
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> > *When a contract in writing is signed by parties, they are bound by the terms contained therein whether they take the trouble of reading them or not. This principle has been extended to cases where the contract does not actually contain the terms but a reference is made to another document or contract where those terms are to be found. The reason for holding that those terms must be taken to have been incorporated by reference in their signed agreement is that it was possible for any of them to look into that document and ascertain the terms.* An examination of the authorities in which this view has been adopted shows that they are either cases in which the other contract is one between the same parties and therefore the terms including the arbitration clause might be taken to have been within the knowledge of the parties; or cases in which there is a reference to a specific document which was in existence and whose terms could easily be ascertained if the parties wanted to. It is reasonable to hold that when the parties had referred to a document which was in existence they had knowledge or what comes to the same thing, could have had knowledge, of all the terms contained in that document and an arbitration clause contained in that document must, therefore, be held to be binding on them exactly as if it had been incorporated *in extenso* in the signed contract. The foundation of this reasoning is the existence of another specific document containing an arbitration clause. It is

A essential that the terms of an agreement must be precise and definite. This applies as much to an arbitration agreement as to other agreements.

Before holding that the parties have agreed in writing to refer their dispute to arbitration and in the absence of such a clause in the
B agreement actually signed by the parties there must at least be a specific contract or document containing such a clause in respect of which it might be said that it has been incorporated in the agreement of the parties by reference.

[19] In the present case, the respondent's standard terms and conditions
C were circulated to all buyers and additional copies were made available at all their branch offices. The appellant having bought from the respondent over a lengthy period of time had full knowledge and had done business throughout on the basis of the said respondent's standard terms and conditions.

Therefore the sales contracts constitute the concluded contracts between the parties, the
D *said standard terms and conditions clearly referred to and incorporated there, would be effective and binding upon the appellant regardless of its denials of having seen them.*

[29] Counsel for the appellant argued that based on the principles that were established in *AJWA*'s case, it follows that the terms of trade were
E incorporated by reference into the sales contract *via* the web-link regardless of whether the respondent took the trouble of "clicking" on the web-link and/or to read the terms of trade. Counsel said that *AJWA*'s case made it clear that parties are bound by the terms of the contract which they had executed, and this included reference to other incorporated documents where
F those terms can be found whether they took the trouble of reading them or not.

[30] Therefore, for the purposes of encl. 19, it was critical for the JC to determine whether the terms of trade were incorporated into the contracts for the purchase of IWMP. For the appellant, it was argued that the terms of
G trade were incorporated because, as decided by *AJWA*, parties were bound by the terms of the contract which they had executed and this included reference to another incorporated document, regardless of whether they had read the other (incorporated) document or not.

[31] Therefore, if parties had agreed to be bound by a contract which also
H included reference to terms contained in another document, regardless of whether parties took the trouble to read them or not, these documents and their terms would be binding upon the parties. As such, it was argued that the respondent was bound by the terms of trade as it was already incorporated through reference in each sales contract which was signed by
I the respondent.

[32] In amplification, counsel said that at all material times, the web-link to the terms of trade was readily available and accessible. Hence, the respondent's filing of suit 653 within the jurisdiction of the Malaysian courts was a breach of the express agreement made between the parties and should not be condoned. Counsel said that the respondent should be held to their agreement. Thus, the action, if at all, should have been filed in the New Zealand courts.

[33] In response to the respondent's contention that the terms of trade was never furnished to them, counsel said that this is misconceived because the web-link to the terms of trade was always accessible and thus available to the respondent and the contents were merely a click away.

[34] It was also emphasised that the respondent executed several sales contracts with the appellant over a span of about a year, where at all times, the web-link was made available to the respondent. The respondent never asked for a hard copy of the terms of trade nor did the respondent complain that they could not access the web-link.

[35] Counsel said that the respondent's disavowal of any knowledge of the terms of trade was an afterthought and a tactical move to circumvent what had been agreed by parties.

[36] Counsel for the appellant argued that the terms of trade were applicable to the contracts for the purchase of the IWMP and that the Malaysian courts should give effect to the choice of jurisdiction that was agreed to between the parties.

[37] Counsel referred to the Court of Appeal's decision in *World Triathlon Corporation v. SRS Sports Centre Sdn Bhd* [2019] 1 CLJ 381; [2019] 4 MLJ 394; [2018] 6 AMR 122; [2018] AMEJ 0843 CA ("*World Triathlon*") for the proposition that the Malaysian court had an obligation to enforce the foreign jurisdiction clause. In that case, Justice Harmindar Singh JCA (as he then was) said:

> [19] In the present appeal, just like the *American Express* case, the *parties here had agreed to a foreign jurisdiction clause as well as to be governed not by the laws of Malaysia but by the laws of Florida/USA*. Now, the law in relation to the exclusive jurisdiction or forum selection clause is not controversial. *Although generally a forum selection clause does not oust the jurisdiction of the court, the court is nevertheless obliged to give effect to it as that is what the parties had agreed (see Globus Shipping & Trading Co (Pte) Ltd v. Taiping Textiles Bhd [1976] 1 LNS 31; [1976] 2 MLJ 154). Disregarding such a clause would effectively mean the courts condoning a breach of the agreement*.
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> (emphasis added)

[38] The Court of Appeal in *World Triathlon* further held that Malaysian courts are obliged to give effect to an agreed jurisdiction clause unless "**the party challenging the exclusive jurisdiction clause is able to show exceptional circumstances amounting to a strong cause**" warranting a refusal to give effect to such an agreement. The relevant passage from the judgment of the Court of Appeal reads as:

> [20] On the question of how such discretion is to be exercised when confronted with a foreign jurisdiction clause, the then Federal Court in *Globus Shipping* accepted the approach as summarised by Brandon J in *The Eleftheria* [1969] 2 All ER 641 as follows:
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> > The principles established by the authorities can, I think, be summarised as follows: (I) where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, *is not bound to grant a stay but has a discretion whether to do so or not. (II) the discretion should be exercised by granting a stay unless strong cause for not doing so is shown*. (III) The burden of proving such strong cause is on the plaintiffs.
> >
> > (IV) In exercising its discretion, *the court should take into account all the circumstances of the particular case*. (V) In particular, but without prejudice to (IV), the following matters, *where they arise, may properly be regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts; (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects; (c) With what country either party is connected, and how closely; (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would – (i) be deprived of security for that claim, (ii) be unable to enforce any judgment obtained, (iii) be faced with a time-bar not applicable in England, or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial*.
>
> [21] So, to surmise, where there is an exclusive jurisdiction clause, effect should be given to it and a stay ought to be granted, *unless the party challenging the exclusive jurisdiction clause is able to show exceptional circumstances amounting to a strong cause warranting a refusal. The burden is on the party challenging the exclusive jurisdiction clause to show why they should not be bound to honour the part of the contract where they had agreed to jurisdiction*.

[39] The appellant further submitted that incorporation by way of reference *via* web/electronic link is not one that is alien to the modern world given the rapid growth of e-commerce and digitalisation. The sales contract expressly stated that terms of trade will apply to the contract and parties agreed to comply with the terms of trade. By signing the sales contracts, the respondent had expressed its intention to be bound by the terms of trade.

[40] Counsel also said that this court should also consider the fact that the appellant's witnesses to answer to the various allegations made by the respondent, are in New Zealand. The IWMP was only received at Port Klang, Malaysia, whereas the manufacture and/or production of the IWMP itself took place in New Zealand.

[41] The witnesses best qualified to testify as to the process of manufacturing or production of the IWMP are in New Zealand.

[42] In this regard, in *World Triathlon*, Harmindar Singh JCA (as he then was) held:

> [22] Now, although the learned judge had appreciated the correct principles when he held that "the burden is on the plaintiff to show a strong case to override the agreement in the forum selection clause", the learned judge, however, had erred in his finding that the respondent had discharged this burden. In the judgment, the learned judge found:
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> > [13] Here, I find that witnesses to the triathlon events organised by plaintiff, financing of the events including online payments of participants fees, the fraud and conspiracy by one of the plaintiffs director are all in Malaysia. This includes Dato' Sri Ram who liaised with defendant *vide* email to explain the defaults complained by the defendant. Certainly, the plaintiff will have to bear substantial expense and inconvenience to bring all these witnesses to Florida, United States.
> >
> > [14] The Plaintiff also is a Malaysian incorporated company and has its place of business in Malaysia. Evidence including documents relating to the Event License Agreement and matters related to the triathlon event has to be given by the plaintiff's representatives who reside in Malaysia.
> >
> > [15] Therefore the evidence on issues of fact is situated or more readily available in Malaysia.
> >
> > [16] In the circumstances, I find that the plaintiff has shown a strong case to override the forum selection clause and to have the suit to be tried in Malaysia.
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> [23] *In our view, these considerations accepted by the learned judge are insufficient to override the exclusive jurisdiction clause. More is required as the parties had willingly and contractually agreed to the exclusive jurisdiction clause as well as the laws of Florida/USA as the law of choice for the litigation. The respondent must show more than just inconvenience to witnesses and cost of litigation. Practical inconvenience is not a determinative factor. What matters most is the suitability of the forum which will meet the ends of justice*.

[43] We may turn now to the respondent's arguments.

[44] Counsel for the respondent contended that the appellant was not entitled to rely on the sales contracts to incorporate the "Open Country terms of trade" *via* the web-link because the endorsement itself had stated, "Please be advised that OCD has modified its terms of trade please consult the attached terms".

[45] Thus, the alleged terms of trade had been modified and the reader could not be expected to "consult the attached terms" in circumstances where the actual terms were not attached to the sales contracts.

[46] At any rate, counsel for the respondent said that even assuming the appellant was right that there was the terms of trade in the web-link, which had not been proven, the terms of trade would have been superseded by the modified terms of trade which the appellant was supposed to attach to each sales contract. In essence, the document in the web-link, if they existed, could no longer be applicable.

[47] Secondly, it was argued that for the terms of trade to be incorporated by reference *via* web-link into a contract in writing, the courts typically look at whether the referencing language is clear and unambiguous and whether there is a clear reference to where the terms can be found.

[48] Counsel said that the terms of trade *via* web-link should be clearly referenced in the written contract. The language referencing online terms and conditions should be clear, specific and lead to an exact location where the terms of trade can be found. In the present case, the referencing language employed by the appellant to refer the respondent to the additional terms (modified terms of trade) was ambiguous. There was also no specific and clear reference as to where the modified terms of trade could be found.

[49] It was pointed out that contrary to what was expressly stated in the endorsement, no modifications to the terms of trade were actually attached.

[50] In amplification, counsel said that:

(i) Firstly, reading the first paragraph after the web-link, one gets the impression that the "terms of trade" are in http://opencountry.co.nz/termsoftrade. Reading the second paragraph, one gets the impression that the terms of trade had been modified and one should consult "the attached terms" for the modified version.

(ii) There is no other way to read these two paragraphs. If http://opencountry.co.nz/termsoftrade contained the modified or latest version of the terms of trade, the second paragraph would be otiose.

(iii) There would not be a need to highlight "Please be advised that OCD has modified its terms of trade please consult the attached terms". One could just go to http://opencountry.co.nz/termsoftrade to find the latest modified terms of trade.

(iv) The second paragraph "Please be advised that OCD has modified its terms of trade please consult the attached terms" gives the impression that the terms of trade, if any, in http://opencountry.co.nz/termsoftrade had been modified and would not be the latest. One gets the impression that the modified version was "attached" to the "sales contract".

[51] According to the respondent's counsel, no one would expect the word "attached" to mean that the revised terms of trade could be found "in" http://opencountry.co.nz/termsoftrade. He referred to *Black's Law Dictionary* which defined "attach" as "to annex", "bind", or "fasten". He gave as an example the exhibit which is attached to the pleading. Hence, "please consult the attached terms'" must necessarily mean the modified terms of trade were attached to the "sales contract". As no terms of trade were attached, there were no additional terms incorporated into the "sales contracts". And as a result of the ambiguity in the paragraphs in the sales contracts, there could not have been any notice given to the respondent to enable the respondent to agree or manifest their agreement to the additional terms. In short, there was no valid incorporation by reference.

[52] In conclusion, counsel for the respondent submitted that in terms of *forum conveniens* the Malaysian courts were also the most proper and convenient forum to adjudicate on this dispute. As at the hearing date, the parties would have already filed all the documents and witnesses' statements. Counsel emphasised that the case was already scheduled for trial and all or most of the relevant witnesses and/or evidence are within the jurisdiction of the Malaysian courts.

[53] Counsel referred to the following cases: *Petrodar Operating Co Ltd v. Nam Fatt Corporation Bhd & Anor* [2014] 1 CLJ 18; [2014] 6 MLJ 189; [2014] 1 AMR 401 FC (paras. 23 and 24), *Apex Marble Sdn Bhd & Anor v. Leong Tat Yan* [2018] 1 LNS 32; [2018] 7 MLJ 84; [2017] 4 AMR 323; [2017] AMEJ 0543 HC (paras. 54, 71 to 74) and *American Express Bank Ltd v. Mohamas Toufiq Al-Ozeir & Anor* [1995] 1 CLJ 273; [1995] 1 MLJ 160; [1995] 1 AMR 253 SC.

The JC's Grounds Of Judgment

[54] We may now turn to the JC's grounds of judgment in respect of the choice of jurisdiction issue.

[55] The relevant parts of the judgment which dealt with this issue are as follows:

> Court's findings on the second issue
>
> [88] The plaintiff pleaded in the statement of claim that the contracts were made within the jurisdiction and the breach occurred in Malaysia and therefore the Malaysian courts have jurisdiction.

A [89] Following the elucidations in *Matchplan*'s case, the plaintiff's pleaded case must be assumed to be true at this stage. As such I find that the High Court of Malaya is seized of extra-territorial jurisdiction by virtue of s. 23(1)(a) and (c) of the Courts of Judicature Act 1964 as well as sub-rule (F) and/or sub-rule (G) of the O. 11 as the action is:

B (a) brought against the defendant to enforce the seven contracts which were made within the jurisdiction;

(b) brought in respect of a breach committed within the jurisdiction which rendered impossible the performance of so much of the contract as ought to have been performed within the jurisdiction.

C [90] The defendant however argues there is a foreign jurisdiction clause where parties have agreed to submit to the jurisdiction of the courts of New Zealand and for New Zealand law to apply in a document known as "Open Country terms of trade" which the defendant contended formed part of the contract between the parties.

D [91] However, the Federal Court case of *Globus Shipping & Trading Co (Pte) Ltd v. Taiping Textiles Berhad* [1976] 2 MLJ 154 made clear that, notwithstanding such clauses, a Malaysian court could not be ousted *simpliciter* from exercising the discretion, according to the doctrine of *forum non conveniens*, as to whether to hear the instant case or not.

E [92] In my view, critical to the choice of law and jurisdiction clause question is whether such a clause was in fact incorporated into the contracts between the parties.

[93] I am satisfied and accept the plaintiff's assertion that the defendant's "Open Country terms of trade" referred to in an internet link "Please be advised that OCD has modified its terms of trade please consult the F **attached terms**", that the "modified" attached terms were in fact not attached to the sales contracts. As such, there can be no consensus to such a clause of choice of jurisdiction. With no consensus, there is no question of:

(i) breach of the alleged clause to submit disputes to a New Zealand G court, and/or

(ii) the court condoning a breach of the parties' agreement.

[94] The defendant sought to explain that at the material time, the terms were not modified, but the link itself said the terms were modified and the purchaser (plaintiff in this case) is to "consult the attached terms". The H plaintiff asserted that the terms were not attached. I do not think it is for this court at this stage to determine credibility when there is a contest on affidavits as to whether in fact the choice of law and jurisdiction clause was incorporated. I have not overlooked the cases of *World Triathlon Corporation* and *Ajwa For Food Industries Co* cited by the defendant. In my respectful view, they are distinguishable in that the foreign jurisdiction I clause were clearly in fact made part of the contract as contrasted to the case before the court.

[95] With the Supreme Court case of *American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor* [1995] 1 AMR 253; [1995] 1 MLJ 160, as a guiding authority, when it boils down to which is the most appropriate forum to hear the dispute in question, I hold that the High Court of Malaya is the particular forum with which the action has the most real and substantial connection:

(i) the contract was made in Malaysia;

(ii) the breach occurred in Malaysia;

(iii) all or most of the relevant witnesses and evidence in the defective milk powder of approximately 1,068,375 mt (more than 1 million kg) are within the jurisdiction of this honourable court;

(iv) the defendant has been paid a colossal sum of USD3,493,048-80 by the plaintiff who does not expect to get milk powder not fit for its purpose; whilst the fitness for purpose of the milk powder is properly a matter for trial, in considering this application, I have to assume the allegation is true, and having paid such a huge sum, to make the plaintiff yet incur stupendous expenses to ship back a million kg of the products and fly its witnesses to New Zealand will in my view be rubbing salt into the wound; I have not overlooked that the defendant will also be put to expense if the matter is heard in the High Court of Malaya but at least it already has USD3,493,048-80 of the plaintiff's money;

(iv) Both New Zealand and Malaysia have a system of law with its foundation in the English common law system, inherited from being a part of the Commonwealth and case laws made by decisions of the courts; there will be no earthshaking or material differences in the law system as such applicable to the sale of goods and contract law;

(v) With Malaysia having an efficient court system that aims to dispose off each case within nine months from date of filing - an achievement and effort recognised by the World Bank, I have my doubts whether the defendant genuinely desires a trial in New Zealand, or was only seeking a procedural advantage there. On the facts available at this stage, the defendant's conduct in the change of address for service between the first service of the notice of writ and the second service and yet after the change of address, it continued to use the old address in the affidavits filed in this court calls into question the procedural advantages it attempts to seek and exploit.

[96] With a short waiting time for trial, and taking into consideration each of the above matters, none of which alone necessarily is determinative but together they present a persuasive picture, I am satisfied that "it would be unjust to the plaintiff to confine him to remedies elsewhere".

A [97] I therefore hold that the Malaysian court has jurisdiction; the dispute is most closely connected to it, and is the most appropriate forum to hear the dispute as to meet the ends of justice.

[98] Enclosure 19 is dismissed with costs of RM6,000.00

B **[56]** Essentially, the JC concluded that there was no consensus on the terms of trade as the "modified" terms were not attached to the sales contract. By that reasoning the JC jettisoned the terms of trade and held that they were not applicable. It is obvious that the JC was influenced by the respondent's assertion that the modified terms were not attached.

C **[57]** Indeed, the real and perhaps only question is, even if the "modified" terms were not attached, whether that of itself, made any difference to the applicability or to the incorporation of the terms of trade.

[58] On this point, it should be mentioned here that the endorsement in the sales contracts which read as, "Please be advised that OCD has modified its D terms of trade please consult the attached terms", is found in the sales contracts dated 4 November 2016, 9 December 2016, 5 January 2017, 27 February 2017, and 10 March 2017. However, as pointed out, it did not appear in the sales contract dated 8 September 2017.

Our Decision

E **[59]** The central issue in this appeal is whether the terms of trade were incorporated by reference. We will start by setting out some general principles concerning this area of the law of contract. This takes us back to some of the older cases on whether certain terms were properly included into a contract.

F **[60]** First, it is trite that for a term to be incorporated into a contract, notice of that term must be given either before or at the time when the contract was formed. See: *Olley v. Marlborough Court Hotel* [1949] 1 KB 532 CA. The principle that was established by that case was that a representation made by G one party cannot become a term of a contract if it was made after the agreement was made. The representation can only be binding where it was made at the time the contract was formed.

[61] Next, the representation as to terms to be incorporated should be found in a document that one would expect to find terms to be printed H thereon. In *Chapelton v. Barry Urban District Council* [1940] 1 KB 532 CA the claimant hired a deckchair from Barry Urban District Council to use on a beach. In that case, the claimant took two receipts from the beach attendant, on the back of which were the words "the council will not be liable for any accident or damage arising from the hire of the chair". The chair was I defective and it broke. The claimant was injured. He sued the council. The council relied on the exclusion clause on the receipts to protect them from

liability. They lost. The Court of Appeal held that the clause could not protect the council, as the receipt was not a document that one would expect to contain contractual terms.

[62] The next point is that if a party signed a contractual document, then it is automatically considered to be binding, even if the party had not read the terms. In *L'Estrange v. F Graucob Ltd* [1934] 2 KB 394 the Court of Appeal held that a written document was contractually binding even though the claimant had not read the document.

[63] The other aspect of the principle is that for clauses to be considered incorporated, reasonable steps must be taken by the party who inserted the term to bring it to the attention of the other party. In *Parker v. South Eastern Railway Company* [1877] 2 CPD 416, it was held that it does not matter if one party actually read a set of terms and the only requirement is that the other party has taken reasonable steps to bring the terms to their attention. Of course, what constitutes as reasonable steps will depend on the facts and circumstances of the particular case.

[64] It is indisputable that in the present case, the respondent (buyer/importer) and the appellant (seller/exporter) had a course of dealings from around 4 November 2016 to 8 September 2017. In all the sales contracts (issued by the appellant and duly accepted/signed by the respondent without any comment, modification or qualification), it was clearly stated that the terms of trade formed part of the contract and that parties agreed to comply with the terms of trade in performing their obligations under the contracts. The endorsement in each of the sales contract referred to a web-link, *to wit*, http://opencountry.co.nz/termsoftrade. The web-link was endorsed in all the sales contracts. However, the respondent claimed ignorance of the terms of trade and this may well be because they did not "click" on the web-link to access the terms of trade.

[65] The sequence for each sale/purchase of IWMP transaction was that on confirmation of price and quantity of IWMP for a particular sale, the appellant forwarded to the respondent, a sales contract to be executed by the latter.

[66] And when they forwarded a duly signed copy of the sales contract back to the appellant, the respondent also included a purchase order which contained supplementary details regarding the sales order such as delivery and payment details. The appellant's position was that the purchase order did not replace or modify the terms of trade.

[67] In our view, the terms of trade are to be found in the web-link and they formed part of the contracts for the purchase of IWMP. It is clear that cl. 19.2 of the terms of trade dealt with the express choice of jurisdiction ie, the courts of New Zealand. As we said earlier, the respondent (for whatever reason) did not "click" on or look up the web-link. But that does not mean that the terms of trade which are contained in the web-link, do not apply.

[68] The burden was on the respondent to look up the terms of trade *via* the web-link. The failure on the respondent's part to do so is akin to a contracting party not bothering to avail themselves of the terms, and to read and understand the same, with the benefit of legal advice or otherwise.

[69] In our view, the terms of trade which were duly incorporated by reference, will apply, regardless of whether the respondent had accessed them *via* the web-link provided. (See: *AJWA*'s case). We agree with the submission that was made on behalf of the appellant that if parties had agreed to be bound by a contract which also included a reference to another document, regardless of whether parties took the trouble to read them or not, then these documents and their terms would be binding upon the parties.

[70] It is important to emphasise that there was no evidence that the respondent had accessed the terms of trade *via* the web-link which had been provided, or had attempted to do so. There is no suggestion by the respondent that it experienced any sort of difficulty in terms of trying to access the web-link. And it is not in dispute that the respondent did not ask for a copy of the terms of trade to be furnished or even enquired about them.

[71] If the respondent was indeed oblivious of the terms of trade, it was plainly because of its indifference. Having noticed the endorsement and the word "attached", it chose to ignore the web-link provided. That was necessarily at the respondent's own peril. The respondent was of the view that the appellant was under a duty or obligation to furnish them with a copy of the terms of trade. We disagree. In our view, there was no such duty or obligation as the terms of trade were, as the appellant put it, just a "click away".

[72] Of course, if there was any technical difficulty in downloading the terms of trade, then all that the respondent had to do was to ask the appellant and it would have been given the requisite document. But here, throughout the period that the contracts had been entered into for the supply of the IWMP by the appellant, the respondent never asked to be furnished with the terms of trade. It was, after all available and accessible *via* the web-link. The appellant was therefore entitled to assume that the respondent was aware of the contents of the terms of trade.

[73] As such, the result is that the respondent was bound by the terms of trade as it was already incorporated by reference *via* the web-link as provided in each sales contract that was signed by the respondent.

[74] For completeness, we should also mention that there were also other terms in the terms of trade, pertaining, *inter alia*, to the appellant's right to amend the terms [19.8], entire agreement cl. [19.11] and more importantly, cl. 19.12 which stated that "The parties agree that these terms are intended to create legally binding obligations upon the (respondent's) receipt of a sales contract issued by the (appellant)."

[75] Clauses 19.8, 19.11 and 19.12 of the terms of trade are reproduced and they read as follows:

> 19.8 The Company reserves the right to change these Terms from time to time. The varied Terms will be posted on the Company's website and the varied Terms will apply to all Contracts entered into between the Company and the Customer after the date the varied Terms are posted on the Company's website. It is the Customer's responsibility to regularly check the Company's website to ensure that it is familiar with the latest Terms.
>
> 19.11 These Terms, together with the Contract, constitute the sole and entire agreement between the parties in relation to their subject matter and supersedes all prior negotiations, dealings, agreements and understandings between the parties. Subject to clause 19.8, these Terms cannot be changed unless the change is agreed in writing and signed by the authorised representatives of both parties. No other terms of trade shall apply between the parties in relation to the sale and supply of the Goods.
>
> 19.12 The parties agree that these Terms are intended to create legally binding obligations upon the Customer's receipt of a sales contract issued by the Company.

[76] We note that the JC made much of the fact that the word "modified" appeared in the sales contracts, and concluded that there was no consensus because the modified terms of trade were not attached.

[77] First, it is important to appreciate that the endorsement with the word "modified" did not appear in the final sales contract dated 8 September 2017. Secondly, the issue of alleged modification to the terms of trade was explained by one Andrew Paul McCutcheon in his affidavit on behalf of the appellant that:

> Prior to entering into the sales contracts, the Defendant's terms of trade were last modified back in mid-2016 being available *via* the web link from that time and being the same for all the sales contracts. *Those terms of trade were not modified again by the Defendant until late 2018, remaining available via the web link up until that time. The Plaintiff never requested a hard copy of the terms of trade either prior to or after executing the sales contracts.* (emphasis added)

[78] In conclusion, for the reasons as stated above, it is our finding that notice of the terms of trade was given at the time when the contract was formed, and it was referred to in a document (sales contract) that one would reasonably expect to contain contractual terms. And it is also our finding that express notice was given to the respondent that the sales contracts were subject to the terms of trade, which terms of trade was accessible *via* a web-link provided. There was no ambiguity whatsoever as to where the terms of trade were located. This, in our view, satisfied the requirement that the appellant had taken reasonable steps to bring the terms of trade to the respondent's attention and incorporating it in the sales contracts.

[79] It is therefore clear that there was an exclusive jurisdiction clause per cl. 19.2 of the terms of trade and this was incorporated in the contracts for the purchase of the IWMP. Therefore, the respondent must be held to their bargain and a Malaysian court is obliged to give effect to the exclusive jurisdiction clause, unless the respondent, as the party seeking to avoid the application of the clause, are able to establish that there are exceptional circumstances to justify the contrary (see: *World Triathlon*).

[80] Having carefully examined the record of appeal, we did not find any convincing evidence that would qualify as exceptional circumstances to justify not giving effect to the exclusive jurisdiction clause. Of course, from the perspective of the respondent, it would be quite unfair for the action to be filed in the New Zealand courts as they had paid a substantial sum to the appellant and would have to incur further costs in having to file and prosecute their action in New Zealand.

[81] But then again, those were the terms upon which they had contracted with the appellant when they agreed to purchase the latter's goods. Whatever the inconvenience that the respondent may be put to is purely a consequence of their agreement. The respondent's complaint in having to file the action in New Zealand is a complaint that can cut both ways. The appellant can easily mount a like counter argument particularly when it is clear that the action ought to have been filed in New Zealand in accordance with cl. 19.2 of the terms of trade.

[82] Ultimately, we were satisfied that the appellant has succeeded in demonstrating that the terms of trade were incorporated in the contracts for the purchase of IWMP and that the respondent had filed suit 653 in disregard of cl. 19.2 of the terms of trade. In our view, there was a misdirection on the part of the JC in concluding that there was no consensus *vis-a-vis* the terms of trade.

Outcome

[83] For the reasons as stated above, we allowed the appeal and set aside the High Court's order dated 9 November 2020.

[84] The action in the High Court was ordered to be stayed as per prayer (5) of encl. 19 save for the issue of costs of the trial thrown away, which was to be determined by the High Court.

[85] We ordered costs in the sum of RM10,000 as costs here and below (for encl. 19 only).